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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC MAIL ROOM

93-28

In the Matter of)
)
Amendment of Section 73.202)
FM Table of Assignments)
(Colonial Heights, Tennessee))

MM Docket No. ~~93-28~~
RM-8172

To: Chief, Policy and Rules Division

REPLY TO
RESPONSE TO ORDER TO SHOW CAUSE

Murray Communications ("Murray"), permittee (File No. BPH-900220MM) of WLJQ(FM), Colonial Heights, Tennessee, by counsel herewith submits its Reply to the "Response to Order to Show Cause," filed by Franklin Communications, Inc. ("Franklin"), licensee of WMXK(FM), Morristown, Tennessee, on December 22, 1993, as follows: 1/ 2/

1. In its Response, Franklin states its objection to the proposed substitution of Channel 231A for 240A at Morristown, Tennessee and the modification of license of WMXK(FM) to operate on Channel 240A and requests that the the proposal be denied or

1. WFSM, Inc., the licensee of WCTU(FM), Tazewell, Tennessee, did not file any timely response to the Order to Show Cause and must be deemed to have consented to the proposed substitution of Channel 290A for 231A at Tazewell, Tennessee.

2. The Commission's Order to Show Cause did not establish a date for filing replies to Franklin's Responses nor do the Rules establish a deadline. Undersigned counsel for Murray was out of the office between December 23, 1993 until January 3, 1994, when he first had an opportunity to review Franklin's Response and prepare this Reply, which is being promptly filed.

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that it be permitted to recover lost revenues during the period its station is off the air and that Murray be required to place at least \$ 25,500.00 in escrow. Franklin's opposition to Murray's proposed frequency change and its requested relief are utterly without merit, unsupported and inimical to the public interest, which would clearly be served by the implementation of Murray's proposal.

2. At the outset, several general observations may be made regarding Franklin's Response. As an initial matter, Franklin's objections are based solely upon consideration of its private economic interests, not upon any demonstrated negative impact upon the public interest. As indicated by the Commission in its Second Report and Order (Circleville, Ohio), 9 RR2d 1579, 1583 (1967) ("Circleville, Ohio") (a case upon which Franklin relies), "economic injury is, of course, a relevant consideration only insofar as it affects the public interest, rather than the private interest of the licensee," citing FCC v. Sanders Brothers Radio Station, 309 US 470 (1940). Yet, Franklin has failed to offer any indication, much less demonstrate conclusively, that the economic injury alleged on its part would negatively impact the public interest, nor, even if it would, that any negative impact on the public interest would outweigh the benefits accruing from the increased service to the public provided by the upgrades of WLJQ(FM) to Class C2 status ³/ and WHAY(FM), Whitley

3. The proposed upgrade of WLJQ(FM) will result in an increase of the population receiving 60 dbu service by 203,615, an amount almost equal to the entire population of Morristown.

City, Kentucky, to full Class A (6 kw) status.

3. Secondly, Franklin's response reflects either a misapprehension or an intentional misapplication of the precedent it cites, Second Report and Order (Circleville, Ohio), 9 RR2d 1579 (1967) and Report and Order (Columbus, Nebraska), 59 RR2d 1184 (1986), neither of which supports its arguments. Likewise, Franklin's Response is entirely unsupported by any affidavit, statement under penalty of perjury or any other evidence, whatsoever, rendering its factual contentions entirely speculative and unreliable.

4. Finally, and most importantly, it is readily apparent that there is nothing unique, whatsoever, about the circumstances presented in this case. On the contrary, Murray's proposal constitutes nothing more than a routine, run-of-the-mill frequency upgrade proposal, involving channel substitutions.

5. Franklin contends (at para. 3) that its alleged, anticipated economic injury constitutes a relevant consideration in this proceeding. However, as indicated above, Franklin's reliance upon Circleville, Ohio, is misplaced, inasmuch as the Commission there reiterated the long-standing proposition that private economic injury, even if demonstrated (and none has been demonstrated here), is irrelevant, unless it negatively impacts the public interest. In this regard, as emphasized above, Franklin's entire Response is premised solely upon considerations based upon its own private interests, not the public interest. In this regard Franklin seriously misapprehends its status as a

Commission licensee, failing to recognize that it has no property interest, whatsoever, in the frequency which it currently utilizes. ⁴/ This fundamental failure to recognize its lack of "any claim to the use of any particular frequency" permeates and, thus, completely undermines Franklin's arguments. ⁵/

6. Franklin's reliance upon the Report and Order (Columbus, Nebraska), 59 RR2d 1184 (1986) ("Columbus, Nebraska") is, likewise, misplaced, inasmuch as the particular circumstances addressed in that case are not present here. Thus, while the Commission recognized in Columbus, Nebraska, that multiple frequency changes in a rulemaking proceeding could result in delay, confusion among listeners, and disruption to the business of existing stations, it also concluded that these concerns could be resolved by, henceforth, limiting to two the number of involuntary channel substitutions which a petitioner could propose in the context of a rulemaking proceeding, absent a showing of special public interest factors. However, inasmuch as Murray has fully complied with that requirement, the concerns expressed in Columbus, Nebraska, are not relevant here. See: Order to Show Cause (DA 93-1222), Note 3, rel. November 2, 1993.

4. In acquiring the license for WMXX(FM), Franklin (in certifying to FCC Form FCC 301 or 314) waived "any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same."

5. For example Franklin contends (at para. 4) that the "serious disruption of service to Franklin" would outweigh "the slight advantage to Murray" (emphasis added), reflecting its consistent focus upon the private interests of the parties, as opposed to the benefits or detriments to the public interest that would result from the implementation of Murray's proposal.

7. Franklin contends (at para. 4) that Murray's proposal would require that it "change to the frequency of one of its competitors", i.e. WCTU(FM), Tazewell, Tennessee. In this regard, Franklin contends, without evidentiary support, that Tazewell is located 53 kilometers from Morristown, that there is "a large coverage overlap" between the two stations, and that WCTU(FM) can be "heard" in Morristown. Thus, Franklin speculates that, if implemented, the proposed channel substitutions will cause listener confusion: that listeners will assume that WMXK(FM) is WCTU(FM), and, thus, WMXK(FM) will assume the reputation among listeners and advertisers of the Tazewell station. However, as reflected in the attached Declaration of David T. Murray, WCTU(FM) is not a local competitor and listener confusion is unlikely given that Morristown is located some 25 kilometers beyond WCTU(FM)'s 1 mV/m contour and the stations have different formats. Furthermore, the Commission may take official notice of the fact that WMXK(FM) has been on the air since 1964 and operated by Franklin since 1984. If, as the Commission indicated in Circleville, Ohio, two years is adequate time for a station to acquire "sufficient identity with its listeners so that they will continue to listen to it on its new channel," the ten years which Franklin has operated WMXK(FM) (five times longer) should have been more than adequate for that purpose. See: Circleville, Ohio, at p. 1583. Furthermore, WMXK(FM) is the only FM station licensed to Morristown, Tennessee, in addition to two standard broadcast stations, one of which is also owned by

Franklin, thus, making it unlikely that its listeners will suffer any confusion. Therefore, other than the speculations referenced above, Franklin's claim that serious disruption of service will result from the implementation of Murray's proposal is not only entirely unsupported by any evidence, but unfounded, as well.

8. Franklin contends (at para. 5) that it will incur "substantial expenses" should Murray's proposal be implemented. However, once again, it's claims are entirely unsupported. The fact that Franklin has "called itself 'K-96'" for the past three years hardly prevents it from making the minor change to "K-94." There is nothing unique here in any event, inasmuch as all stations must call themselves something and most promote their frequencies. Likewise, the replacement of current billboards, signs, vehicle logos, stationery, and other promotional material is a normal and expected expenditure, which Murray fully anticipates having to reimburse, as are reasonable expenditures incurred in promoting the change in frequency. See: Circleville, Ohio, at p. 1585. While Franklin also contends that it will incur "substantial equipment expenditures," it offers no support, whatsoever, for this contention. As reflected in the attached Declaration of David T. Murray, expenditures for equipment will be minimal, as only new crystals will be required.

9. Franklin indicates (at para. 6) that it "knows nothing" of Murray or whether it has sufficient funds to reimburse the costs that will be incurred in implementing its proposal, based upon the fact that Murray has not yet commenced operation on

WLJQ(FM). However, as reflected in the attached Declaration of David T. Murray, Murray has not commenced operation of WLJQ(FM) due to shortspacing to its current site and the pendency of this rulemaking proceeding, which will serve to resolve that problem through a site change. Likewise, Franklin's expressed concern that three frequency changes will be involved is unfounded. As an initial matter, Murray has agreements with the Whitley City, Kentucky and Princeton, West Virginia, stations, which limit the level of reimbursement for those stations. Furthermore, as reflected in the attached Declaration, Murray has sufficient funds to reimburse all of the costs that will reasonably be incurred in implementing all three frequency changes, as well as its agreement with WAEY-(FM). Murray has consistently recognized and acknowledged its obligation to reimburse those expenditures which are reasonably and prudently incurred by the affected stations in implementing the proposed channel substitutions, in accordance with Commission Policy. That is all that has ever been required and is all that may be appropriately required here.

10. Franklin's reliance (at para. 6) on Columbus, Nebraska, for the contention that Murray should be required to place \$ 25,500.00 in escrow with a third party "to secure Franklin's position" is entirely misplaced. The Commission's comment in Columbus, Nebraska, that "having necessary funds available and placed in escrow would be a reasonable request by an affected station" was directed to the particular circumstances addressed in that case, indicating that such a requirement might be imposed

in some cases where a petitioner was proposing more than two involuntary channel substitutions, in addition to the showing of special public interest factors which the Commission indicated would be required. Thus, the language from Columbus, Nebraska, cited by Franklin simply reflects the Commission's intention to impose additional and unusual requirements upon petitioners advancing proposals involving more than two involuntary channel substitutions, not routine rulemaking proceedings, involving two involuntary channel substitutions or less.

11. As indicated above, there is absolutely nothing unique about this case, and Murray has fully complied with the requirements set forth in Columbus, Nebraska, by obtaining the advance consent and support of the Whitley City, Kentucky, and Princeton, West Virginia, stations and, thus, proposing only two involuntary channel substitutions (i.e. at Morristown and Tazewell, Tennessee). Franklin has pointed to no case in which the Commission has imposed a requirement that a petitioner place funds in escrow prior to the implementation of a proposed channel substitution. Likewise, other than Columbus, Nebraska (which is inapposite to the facts of this case), Franklin has cited no precedent in which the Commission has indicated any intention to impose such a requirement, and certainly not in a routine rulemaking proceeding, such as this. Furthermore, were the Commission to impose such a requirement, it could not reasonably direct a petitioner to place in escrow whatever amount the affected station merely alleges as anticipated expenses,

especially, where as here, no documentation or evidentiary support, whatsoever, has been offered to justify the alleged, anticipated expenditures. Clearly, to do so would accord undue leverage to the affected station by depriving the petitioner of access to funds, with respect to which the affected station had established no legitimate claim.

12. Franklin's contention (at para. 7) that it should be reimbursed for "lost revenues" is meritless and contrary to Commission policy. The Commission has not merely "expressed reluctance" to require such reimbursement, but has in fact consistently rejected the claim that reimbursement of such alleged losses is appropriate. Indeed, Franklin's arguments only serve to underscore the correctness of Commission's position that such alleged "losses" are speculative in nature. 6/

13. In summary, there is nothing unique about the instant case, whatsoever. Murray has fully complied with the Commission's requirements and only one of the affected stations, WMXX(FM), has advanced any objection, whatsoever. Franklin's Response constitutes a clear attempt to promote its private

6. Thus, while Franklin points to an incident in which "a construction accident" resulted in the station being off the air for a period of three days, its unsupported claim that it ultimately recovered some \$ 15,000 for its damages representing its losses, does not indicate how much of that amount reflected lost revenues versus other costs associated with the incident in question. Furthermore, as reflected in the attached Declaration of David T. Murray, the actual frequency change should be accomplished within a period of 12 to 24 hours. See also: Circleville, Ohio, at p. 1585.

interests to the detriment of the public interest, which would be served by the implementation of Murray's Counterproposal. Furthermore, Franklin's unsupported contentions have not only been shown to be entirely speculative, but in most instances, also demonstrated to be highly suspect, if not entirely erroneous. Likewise, Franklin's request for reimbursement of lost revenue is inappropriate and contrary to Commission policy, due to the speculative nature of such losses and the impossibility of establishing any causal relationship. Finally, Franklin's request that Murray be required to place funds in escrow is not only unprecedented and clearly inappropriate, it is, likewise, unsupported by any evidence, whatsoever, demonstrating either the reliability of Franklin's estimates or the reasonableness of its anticipated expenditures. Accordingly, Franklin's objections are utterly without merit and the relief it requests, being entirely inappropriate and inimical to the public interest, should be denied.

WHEREFORE, the proposal advanced in Murray's Counterproposal and in the Commission's Order to Show Cause should be implemented as proposed.

Respectfully Submitted,

MURRAY COMMUNICATIONS

By:


Timothy K. Brady
Its Attorney

P.O. Box 986
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January 10, 1994

DECLARATION

I, David T. Murray, do hereby swear and state the following:

I am a partner in Murray Communications, permittee of a new Class A FM in Colonial Heights, Tennessee. I have been involved in Broadcast Management and Engineering since the mid 70's. I have performed broadcast consulting services for a number of clients and have been closely involved with the start-up of several new stations.

After reviewing Franklin's Response to Order to Show Cause to our rulemaking, I would like to address several of the issues upon which they commented.

Franklin claims that we propose to "disrupt" the service of several stations in order to accomplish our upgrade. In fact, only one of the affected stations has opposed our proposal - Franklin. Tazewell has filed no opposition to our proposal and we have already reached consensual agreements with the other affected parties. Therefore, there will be only one involuntary move if the Commission should grant our proposal.

Franklin attempts to make a case that listeners will be confused because Franklin will move to the frequency of, in their words, "another station in the same market." Although this has been done in past swaps the Commission has ordered, and therefore would not prevent the Commission from enacting our proposal, in this case Franklin's claim is simply not true, nor even close to being true.

Exhibit "A", attached, calculates the predicted 1 mv or 60 dbu contour for a nominal 6,000 watt Class A FM, which is the licensed class of the Tazewell, Tennessee station. A 6,000 watt ERP at 100 meters could be expected to reach approximately 28 kilometers with its 1 mv, or secondary coverage area signal. Franklin says that Tazewell's FM is some 53 kilometers distant from Morristown, meaning Morristown is about 25 kilometers beyond the Tazewell station's 1 mv contour. Given the distance involved and the fact that both stations are class A's, there might be some overlap of the two signals, but certainly not of any significant nature. For Franklin to attempt to characterize this as a local competitor is absurd.

Another factor likely to reduce listener confusion is the fact that the two stations program distinctly different formats, appealing to different audiences. WMXX Morristown, Franklin's station, programs contemporary oldies from the 60's, 70's, and 80's. WCTU FM in Tazewell programs a country music format. It shouldn't be too hard for Franklin's listeners to realize that they are not listening to their favorite station when the swap is implemented. As a matter of fact, Tazewell could implement their frequency change to 290A several days in advance of Franklin's station's move to Tazewell's current channel, since the frequency to which Tazewell will be moving - the frequency of our construction permit - is as yet unused. That way, the channel to which Franklin would be moving would actually be silent for a few days, further reducing any potential listener confusion as to what station they are listening to.

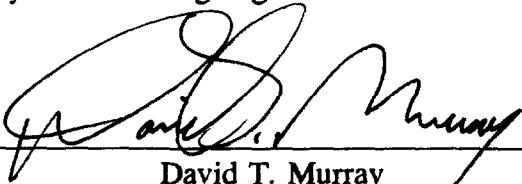
Franklin claims that "substantial equipment expenditures" will be necessary in order to implement the proposed frequency change. Apparently, Franklin has no experience with this process. If they had, they would realize that no major equipment expenditures should be necessary to accomplish a move of a class A FM from 95.9 mHz to 94.1 mHz. Their exciter/transmitter will have to be supplied with a new crystal and be retuned, their modulation monitor will have to have a new crystal (if it is crystal controlled) and be recalibrated, and their antenna will have to be retuned. The only equipment procurement should be these two crystals. The cost for these modifications will be significantly less than what WMXX has conjectured. Murray Communications has sufficient funds to reimburse all of the contemplated changes for each station involved in our proposal. In fact, no other

station has even attempted to raise the conversion expense as an issue, since they know that the associated costs are expected to be minimal.

As further evidence of their lack of understanding of the technical process involved, Franklin contends that there will be a lengthy period of down time for the anticipated frequency conversion. If things are well-planned and coordinated, they should be off the air no more than 12 - 24 hours, in keeping with other stations' experiences in changing frequency.

Franklin laments in its Response to Order to Show Cause that it "knows nothing about Murray Communications", and is concerned because we have yet to put our new station on the air. If Franklin had educated itself more thoroughly about Murray Communications, it would have learned that we have been unable to construct our new station due to a conditioning of our construction permit upon the outcome of another Rulemaking which short-spaces our transmitter site. Quoting directly from our construction permit: "The issuance of this permit is conditioned upon the outcome of the Allotment Rule Making Proceeding in MM Docket no. 91-137." Even though that Rulemaking was filed over a year prior to the issuance of Murray's Construction Permit, it unfortunately remains unresolved and effectively prohibits us from constructing our new facilities until it is resolved or until we effectuate this frequency and site move in order to clear the conflicting Rulemaking. Thus, by granting our Rulemaking proposal, the Commission will clear up an existing conflict and allow our new station not only to finally be constructed, but to serve a significantly larger population as well.

I hereby certify under penalty of perjury that the foregoing statement is true. Signed and dated this 6th day of January, 1994.



David T. Murray

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|   FM/TV FIELD STRENGTH CALCULATOR   |
|   By Bill Turney                     |
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This program calculates the distance to the contours for the FM channels and TV channels 2 through 6. Its accuracy is not guaranteed for FCC applications purposes.

Antenna Height in Feet:	328.08 Ft.
Antenna Height in Meters:	100 Meters
ERP in kW:	6 kW
ERP in dBk:	7.7815 dBk
Field Strength in dBu:	60 dBu
Field Strength in Millivolts:	1 mV

The Distance To The Field Is 17.6 Miles, or 28.3 Kilometers

Do Another Calculation? (Y/N)

CERTIFICATE OF SERVICE

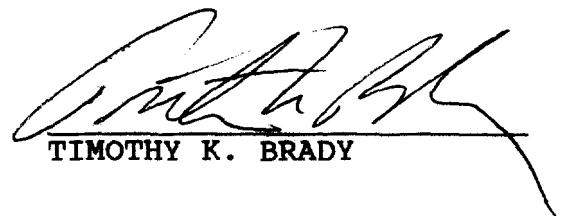
I, Timothy K. Brady, hereby certify that on or before the 10th day of January, 1994, I will have served a copy of the foregoing Reply to Response to Order to Show Cause by First Class US Mail, postage prepaid, upon the following:

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